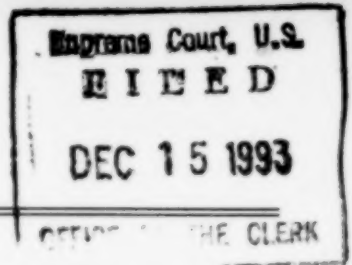


26

No. 92-1384



In The
Supreme Court of the United States
October Term, 1993

BARCLAYS BANK PLC,

Petitioner,

vs.

FRANCHISE TAX BOARD, AN AGENCY OF THE
STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Court Of Appeal Of The State Of California
In And For The Third Appellate District

BRIEF OF JAPAN TAX ASSOCIATION
AS AMICUS CURIAE
SUPPORTING PETITIONER

JOHN A. STURGEON
WHITE & CASE
633 West Fifth Street
Los Angeles, CA 90071-2007
213-620-7700
*Counsel of Record for the
Japan Tax Association*

GARY M. THOMAS
WHITE & CASE
American International Building
20-5, Ichibancho, Chiyoda-ku
Tokyo 102, Japan
Of Counsel

6. p. 1

No. 92-1384

In The
Supreme Court of the United States
October Term, 1993

BARCLAYS BANK PLC,

Petitioner,

vs.

FRANCHISE TAX BOARD, AN AGENCY OF THE
STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Court Of Appeal Of The State Of California
In And For The Third Appellate District

BRIEF OF JAPAN TAX ASSOCIATION
AS AMICUS CURIAE
SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE

The Japan Tax Association (the "Association") is a nonprofit and neutral organization whose membership is comprised of approximately 600 Japanese corporations as well as tax scholars and practitioners. Many members of the Association conduct business operations in a large number of countries throughout the world, including the United States. Most of them have subsidiaries engaged in business in the State of California. The Association is engaged in the study of tax legislation and administration both in Japan and abroad and in the publication of the results of such studies. The Association also provides

opinions, when necessary, with regard to tax systems and tax administration.

The issue presented by Petitioner is the constitutionality of the application of the method of corporate income allocation known as worldwide combined reporting ("WWCR") by the Respondent Franchise Tax Board of the State of California to domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries. This Court reserved resolution of that issue when it considered the constitutionality of the use of WWCR by Respondent to tax the income of U.S.-based multicorporate groups.¹

Determination of the constitutionality of the application of WWCR to domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, is of significant importance to the members of the Association. The decision will impact their future economic and commercial relations with the United States.

On behalf of its members, the Association submits this brief *amicus curiae* in support of the Petitioner.²

ARGUMENT

Members of the Association are adversely affected by the Respondent's use of WWCR. Respondent claims that it imposes tax only on the operations conducted by corporations in California. However, the WWCR as applied by Respondent computes taxable income of a corporation in the State of California based upon the income earned

¹ *Container Corp. of America v. Franchise Tax Board*, 468 U.S. 159, 189 n.26 (1983).

² Petitioner and Respondent have consented to the filing of this brief *amicus curiae* in letters filed with the Clerk of this Court.

by the worldwide operations of all corporations considered to be conducting a unitary business with that corporation, by applying property, payroll and sales factors to apportion such worldwide income. Due to the application of WWCR by Respondent, income which members of the Association earn from business activities solely within Japan and other countries around the world (outside of California) nevertheless is taxed in the State of California. Such income is naturally taxed in the country where it is actually earned. As a result, taxation by the State of California results in double taxation. However, Respondent provides no tax credits for those taxes already assessed upon such income in the foreign jurisdiction where it was earned.

The Association believes that the Respondent's use of WWCR is contradictory to, and incompatible with, accepted international principles of corporate tax assessment and the purpose of double taxation treaties to which the United States is a party, including the Japan/United States Income Tax Treaty ("Treaty"). The internationally-accepted rule for imposing tax on multinational corporate groups is the "arm's length principle," under which the taxable income of each corporate member of the group is computed on the basis of its separate books, records and transactions. The Treaty prescribes the use of the arm's length principle for determining the taxable income of corporate residents of Japan and the United States in their dealings with each other. WWCR, therefore, is contrary to the provisions of the Treaty. Application of WWCR in fact infringes on the basic jurisdiction of each country to impose tax on the income derived from business activities conducted within its borders.

The Association also believes that the Respondent's use of WWCR is an impediment to investment and trade with the United States. A decision by any member of the Association to invest in or expand manufacturing facilities or other business operations in the United States or any other country will depend, in part, upon the tax

burden imposed. If the United States continues to permit double taxation resulting from the application of WWCR, investment in the United States may be seriously impaired.

Furthermore, the Association views compliance with the recordkeeping and filing requirements imposed by WWCR to be extremely difficult. With the proliferation of business operations on a global scale, the necessity to compute profits, property, payroll and sales on a worldwide group basis, particularly according to rules which are unique to the State of California, constitutes an unacceptable burden on business. Although some companies may collect and maintain certain required information in the ordinary course for purposes of public disclosure in consolidated financial statements, the accounting principles and rules applicable in Japan and other countries are often different from those required under WWCR, requiring extensive adjustments to achieve compliance. This compliance burden not only raises non-discrimination concerns under the Treaty but also, as a very practical matter, serves as another serious impediment and deterrent to investment in the United States. The Association also notes that WWCR requires the disclosure to state government authorities in the United States of confidential information obtained from countries around the world and fears that such information might be subject to improper disclosure.

The Association has noted the serious reaction to WWCR of some foreign governments, which are particularly concerned about the discrimination issues arising under WWCR. Although the Association believes that international tax issues, such as those raised by WWCR, should be resolved through careful study and mutual consultations, the Association is deeply concerned that a failure by the United States to reject WWCR may result in retaliation by foreign governments.

The Association is anxious to have the question of the constitutionality of WWCR to domestic corporations with

foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, resolved before more harm is done to its members' economic and commercial relations with the United States and to prevent continued double taxation of its members. In this regard, the Association understands that the State of California has recently amended its law to resolve certain issues concerning WWCR. The State of California continues to require WWCR in principle. In addition, at least six other states use WWCR in whole or in part. It is possible that other states may adopt WWCR in the future. Therefore, the Association believes that the recent California legislation does not mitigate the serious issues created by the application of WWCR and that, consequently, this case presents a substantial and recurring question of great importance and international concern.

CONCLUSION

The Japan Tax Association asks that Petitioner's request for relief be granted.

Respectfully submitted,

JOHN A. STURGEON
WHITE & CASE
633 West Fifth Street
Los Angeles, CA 90071-2007
213-620-7700
Counsel for the
Japan Tax Association

Dated: December 15, 1993